

TAN TIEN CHOY v. KIAW AIK HANG CO. LTD.

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Winslow J.) August 24, 1965]

[Singapore — Federal Court Civil Appeal No. 73 of 1964]

Bills of Sale — Agreement purporting to be hire purchase — Whether bill of sale — Effect of non-compliance with provisions of Ordinance — Bills of Sale Ordinance, 1950, ss. 2, 4 & 6.

The appellant had originally obtained a car, which was invoiced to the respondents and sold by them to the appellant by way of a hire purchase agreement dated June 2, 1959. Subsequently on March 9, 1960, the respondents agreed to advance the appellant a sum of \$2,952 and the parties entered into a fresh hire-purchase agreement in respect of the car. This agreement provided that the sum of \$2,952 and the amount due under the first agreement was to be paid by the appellant by monthly instalments. The respondent purported to seize the car for non-payment of the instalments, and sought a declaration that it was the owner of the car. The trial judge ([1964] M.L.J. 339) made the declaration in favour of the respondent and the appellant appealed.

Held: the agreement of March 9, 1960, was a bill of sale and as it was not registered it was void in respect of the motorcar comprised in the agreement;

(2) as the agreement of March 9, 1960, had fully discharged the earlier agreement of June 2, 1959, the respondent had no further rights under the earlier agreement and could not seize possession of the motor car under it;

(3) the appellant was the owner of the motor car and it had therefore been wrongly seized by the respondent and the appellant was entitled to damages;

(4) in the circumstances the appellant was entitled to judgment for the value of the car less the amount outstanding to the respondent.

Cases referred to:—

- (1) *Manchester, Sheffield and Lincolnshire Railway Company v. North Central Wagon Company* (1888), 13 App.Cas. 554 at p. 560.
- (2) *Charlesworth v. Mills* [1892] A.C. 231 at p. 235.
- (3) *Heseltine v. Simmons* [1892] 2 Q.B. 547.
- (4) *Polsky v. S. & A. Services* [1951] 1 All E.R. 185.
- (5) *Davies v. Rees* (1880), 17 Q.B.D. 408.

FEDERAL COURT.

A. J. Braga for the appellant.

K. S. Chung for the respondent.

Cur. Adv. Vult.

Wylie C.J. (Borneo): In these proceedings the respondent (the plaintiff in the court below) claimed a declaration that it is the owner of a certain car registered No. SH 4382. There was also a claim for delivery of all documents of title relating to the car and for such further or other relief as the court deemed fit. By his defence, the appellant claimed the car to be his and counterclaimed for return of the car or its value and damages for its detention. He claimed that the hire-purchase agreement under which the respondent purported to seize the car and two previous hire-purchase agreements entered into by himself were not genuine hire-purchase

A agreements, but were intended to cover loans, that they were therefore bills of sale and void for non-registration under the Bills of Sale Ordinance. The details of these transactions, as they are disclosed by the findings of the trial judge and the evidence given, were as follows.

B On 29th May, 1959, according to their sales invoice (Exhibit P.1) Progress Motors Ltd. sold this car to the respondent, but delivered it to the appellant. It is clear from the evidence that what happened was that appellant arranged to buy this car from Progress Motors Ltd., but, as he did not pay cash, the car was invoiced as sold to respondent, who in turn sold it to appellant by way of hire-purchase. The agreement for hire-purchase is dated 2nd June, 1959. Appellant paid eight monthly instalments under this agreement.

C On 9th March, 1960, the parties entered into a fresh agreement for hire-purchase in respect of this car. What really occurred, was that the respondent advanced to appellant a nett amount of \$2,952. To this was added the amount the appellant would have had to pay to discharge his liability under the first agreement, plus the "hire-purchase charges" payable in respect of the second period of hire. The total amount so arrived at was the amount payable by monthly instalments under the second agreement.

D On 17th June, 1960, one Lim Boon Hin signed a hire-purchase proposal form in respect of this car addressed to the respondent. Appellant had agreed to sell the car to Lim and the respondent was to finance this transaction, with a guarantee in its favour from the appellant. A series of transactions were undertaken with the object of recording that the respondent had paid the appellant \$9,000 for the car, that the appellant had paid the respondent \$6,062 as the balance outstanding under the agreement of 3rd March, 1960, and that Lim had paid \$1,000 to respondent as a cash deposit on the car. No money in fact passed and it is obvious that the only genuine payment that was intended to be made, was a payment of \$2,938 by the respondent to the appellant for his "equity" in the car over and above the amount of \$6,062 outstanding under the agreement of 3rd March, 1960. However, before this was done, a dispute arose between the parties because respondent's employee demanded "football money" from appellant before he would complete the transaction. The parties fell out, the transaction was never completed and the registration of the car was not transferred from appellant to Lim.

I Lim had, however, signed the hire-purchase agreement in anticipation of the transaction going through, as had appellant as surety. After the date when the first instalment would have been due under this agreement, the respondent

caused the car to be seized because of non-payment of that instalment.

I can see no reason for interfering with the finding of the trial judge that the parties repudiated the agreement entered into on 17th June, 1960. The respondent, by its agent, demanded "football money" in addition to the consideration already agreed upon and this showed its intention to repudiate the agreement in its original form. The appellant, as he was thereupon entitled to do, accepted this repudiation and refused to go on with the transaction. That both parties adopted this attitude receives some confirmation from the fact that appellant was left in possession of the registration book for the car. The explanation given by the respondent that the relevant papers were left with appellant to enable the latter to effect the transfer and registration is hardly credible, as the respondent would have been parting with possession of its only security for the money which it claims was owing to it.

The attempt to settle the amount owing under the agreement of 9th March, 1960, and the subsequent intended sale of the car by the appellant to the respondent were obviously part and parcel of the agreement and, when the transaction fell through, there was no such settlement or sale. I do not accept the contention of the appellant that it was not open to the court below on the pleadings to find that there had been no payment of the balance owing under the second agreement. The amended reply, the form of which shows that it is intended to replace entirely the original reply, contains no admission that the balance owing under the second agreement was paid and therefore, on the pleadings as amended, there was no admission to that effect by the respondent. The conclusion arrived at by the judge that no such payment was in fact made, is clearly supported by the view of the evidence that he has taken and I see no reason to disagree with that view.

Nor do I see any reason for differing from his conclusion that the agreement of 9th March, 1960, is a bill of sale within the meaning of the Bills of Sale Ordinance. The real transaction that took place on that day was obviously an advance of money by the respondent to the appellant and repayment was secured by adding that amount to the balance owing under the original agreement and obtaining the appellant's signature to this agreement covering the total sum. This was therefore an agreement entered into for the purpose, *inter alia*, of securing repayment of the money advanced by the lessor of the chattel to the hirer, and is therefore within the extended meaning of a bill of sale set out in section 2 of the Ordinance.

That definition is for the purposes of the Ordinance only. The provisions of the Ordinance

A nance relating to bills of sale must be complied with in respect of this agreement and non-compliance has the consequences set out in the Ordinance. The non-compliance relied upon by the appellant is non-registration and section 4 (1)(a) provides that the consequence of non-registration is that a bill of sale given for the security of money —

B "shall be void in respect of the personal chattels comprised therein".

C The section does not declare the whole transaction between the parties to be void, and its effect must be considered in the light of the language actually used and the objects of the particular enactment. This provision is the same, so far as material to these proceedings, as section 8 of the Bills of Sale (1878) Amendment Act, 1882, of the United Kingdom. The object of that amendment Act has been said to be to protect needy persons in their dealings with their creditors. See *Manchester, Sheffield & Lincolnshire Railway Co. v. North Central Wagon Co.*⁽¹⁾ and *Charlesworth v. Mills.*⁽²⁾ Bearing this in mind, the effect of a provision that the agreement is to be void in respect of the chattels, cannot mean less than that any rights in respect of the chattels purported to be conferred upon the creditor by the agreement are void. So far as such a provision is concerned, those parts of the agreement which do not affect the chattels may remain valid and binding on the parties. See *Heseltine v. Simmons*⁽³⁾ where this provision was held to avoid the agreement only in respect of the security over the chattels, but to leave valid a covenant between the parties contained in the same document.

F The extent to which section 4(1)(a) avoids particular provisions of the agreement of 9th March, 1960, is obviously a difficult question, but it is not necessary to consider this question in further detail for the purpose of determining this appeal. However, it is relevant to observe that an enactment, the only effect of which is to declare an agreement partially void if the parties fail to register it, cannot affect any other connected transaction which is not within the terms of the enactment, such as, in this case, the discharge of the first hire-purchase agreement by performance in a manner mutually agreed upon.

G As to the effect of this performance, immediately before the agreement of 9th March, 1960, the respondent was the lessor under a hire-purchase agreement which adequately secured to it the payment of the balance of the hire payments. The real purpose of the second agreement was to obtain security for payment of the additional amount being advanced to the appellant. A preliminary step necessary to arrive at this result was to accept settlement of the amount owing under the first agreement,

thus discharging that agreement by performance. As the evidence shows, settlement of the amount owing was effected by accepting the obligation of the appellant under the second agreement to pay not only the amount of the advance, but also the balance owing under the first agreement. The course of dealings between the parties also shows that it was the intention of the parties that this discharge by performance should result in the car becoming the property of the appellant, as provided for when he had performed his obligations under the first agreement. The appellant performed his part, including signing the second agreement in the form mutually agreed upon. At that stage, therefore, the ownership of the car passed to the appellant pursuant to the terms of the first agreement, as modified by the new arrangement agreed to by both parties.

The form of the second agreement presupposes that the car was sold back to the respondent. There was no change in the registered ownership and no documentary exhibits to support this alleged sale appear in the record. In fact, although the second agreement is in the form of a hire-purchase agreement, it was a document to secure payment of the further advance and the balance that had not been paid in cash under the first agreement. Its real purpose was not, therefore, to effect a sale of the car by way of hire-purchase, for ownership of the car had already passed to the appellant. Its real purpose was to create a security over the car for the payment of money. The court must take into account the real nature of this agreement to determine the true rights and interests of the parties. In analysing a somewhat similar transaction in *Polisky v. S. and A. Services* (4) Lord Goddard C.J. came to the conclusion (at page 189) that, on the view that the transaction —

“was no more than a loan.....on the security of the car”,
then —

“it is clear that the hire-purchase agreement was no more than an assurance of personal chattels by way of security for the payment of money”.

The extended meaning of bill of sale given in the Ordinance to this type of transaction renders this analysis of the transaction unnecessary for the primary purpose with which the Lord Chief Justice was concerned, namely, to determine whether the transaction was a bill of sale as defined in the legislation. Nevertheless, the true nature of the transaction, as disclosed by this analysis, remains the test by which the rights of the parties to it must be determined. In my judgment, the agreement of 9th March, 1960, was in reality an assurance of chattels to secure payment of the whole amount then owing to the respondent, given by the appellant as the then owner in favour of the respondent. As the agreement is void in respect of the chattel con-

cerned, it follows that the ownership of the car remains with the appellant.

It also follows that all the respondent's rights in respect of the car are void, including the right to seize possession of the car, if the appellant is in default under the agreement. Consequently, the respondent had no right to seize possession under this agreement.

As the first agreement had been fully discharged by performance in a manner agreed upon, the respondent had no further rights under that agreement and could not seize possession thereunder. It follows that the appellant succeeds on the issue of ownership, which was the foundation of the judgment of the High Court, and on the issue of wrongful seizure. Consequently, that judgment must be wholly set aside.

As to the appellant's counterclaim, he would be entitled to an order for the return of the car, or its value. It would be unreasonable to expect the appellant to accept back in satisfaction of this part of his claim a car that was seized nearly five years ago. It must have deteriorated in value considerably, as is shown by the price obtainable on the abortive attempt to sell the car in 1963.

There is clear evidence of the value of the car about a month before seizure. The appellant and his purchaser had agreed on a selling price of \$9,000 and the respondent had agreed to advance all but \$1,000 of that price on the security of the car. In the absence of any other evidence, there is therefore ample evidence to deduce that, at the time of the wrongful seizure, the car was worth \$9,000. There is also clear evidence that, at that juncture, a sum of \$6,062 in cash would discharge the debt then owing by the appellant to the respondent. If the covenants in the second agreement were still binding, then there is no doubt about the legal obligation of the appellant to pay this amount. In considering this question in relation to the arguments submitted to this court, I have referred only to section 4(1)(a) of the Ordinance, because that was the section on which those arguments were based. No reference was made to section 6 and its effect having regard to the form of this bill of sale. It has clearly not been “made in the form in Schedule A”, to quote from section 6(b). This language seems even more restrictive than that used in the corresponding United Kingdom provision, section 9 of the 1882 Act. That section provides that a bill of sale is void unless made “in accordance with” the form in the schedule. A bill of sale not so made is completely void, and not merely void in respect of the chattels comprised in it. Consequently, personal covenants contained in it are not binding. See *Davies v. Rees*, (5) a decision which has been followed in subsequent cases.

The question arises, therefore, whether there is any legal obligation on appellant to pay this sum of \$6,062, if he receives the car. In *Davies v. Rees* the holder of the bill of sale counter-claimed for the amount of the loan with interest at 5%, the covenant providing for interest at 58%. He succeeded on his counterclaim, the court holding he was entitled to succeed as on a claim for money lent, although the covenant was no longer binding. That decision was unanimously confirmed by the Court of Appeal. As I have already held, the second agreement in the present case was to secure money actually lent and also the cash balance owing to complete the original purchase of the car. Following *Davies v. Rees*, notwithstanding the fact that the security is void and that no covenants contained in it may be enforceable, the sum of \$6,062 remains owing by the appellant to the respondent partly as money lent and partly as the balance of the amount payable to complete the original purchase of the car. Although the respondent was precluded from claiming this amount on the pleadings in these proceedings because of the manner in which his claim was based, he might have included a claim in the alternative based on what has now been found to be the effect in law of the various transactions between the parties. Moreover, it would not be just to award to the appellant the full value of the car at the time of its seizure when he owed this amount in respect of it. I would therefore give judgment in favour of the appellant for the value of the car (\$9,000) less this outstanding amount, i.e. to say for \$2,938.

There remains the question of damages for detention of the car. The only evidence from which the amount of these damages might be estimated, was given by the appellant. He claimed that he received \$10.50 for the daylight hiring of the car and \$9.50 for the night hiring, a total of \$20.00 for twenty-four hours. It was actually hired out when it was seized. In cross-examination, he said that the two people to whom he was hiring the car, one at night and one in the day, had been hiring the car daily ever since he first bought the car, except for odd days. He was responsible for tax (\$674 for six months), tyres, insurance (\$479 a year) and repairs which he said he did himself. The car would have to be off the road occasionally for repairs. On this evidence, a not unreasonable estimate of the gross rent might be \$500 a month, based on the use of the car twenty-five days a month. From this over \$150 a month must be deducted for tax and insurance. The plaintiff has produced no evidence about the cost of tyres and repairs. Tyres would presumably wear out quickly with this constant use, which would also involve high consumption of lubricating and similar oils when repairs were carried out. The appellant must also face high depreciation with such constant

use. All in all, \$200 a month seems reasonable damages to allow for detention of the car as representing the nett profit that might accrue to the appellant.

As to the period for which this should be allowed, the first judgment in these proceedings was delivered on 1st December, 1962. That judgment declared the respondent the owner and therefore, although it was set aside on appeal, from the date of that judgment it cannot be said that the respondent was unlawfully detaining the car. There should therefore be damages in respect of the period from the date of seizure (27th July, 1960) until 1st December, 1962, i.e. for a period of approximately twenty-eight months. I would therefore assess these damages on the available evidence at \$5,600.

In the result, the appeal should be allowed, the judgment of the court below set aside, and the appellant should have judgment against the respondent for \$8,538. He should also have an order for costs of this appeal and also of both trials in the court below. There is already an order in his favour in respect of the costs of the first appeal.

It was agreed by both counsel that the taxi-licence remained the property of the appellant. Pursuant to this judgment, the documents relating to the car, other than the taxi-licence, must be delivered by the appellant to the respondent and the appellant must sign a transfer of registration of the car in favour of the respondent or its nominee. The parties should have liberty to apply to the High Court should any difficulty arise in regard to these aspects.

Barakbah C.J. (Malaya): I agree.

Winslow J.: I had originally intended to make some observations on whether the Money-lenders Ordinance has application to any of the transactions herein and, if so, what different consequences (if any) should follow. However, since this has not been pleaded, I propose to refrain from doing so.

I have had the privilege of previously reading the judgment of the Chief Justice, Borneo, which he has just delivered and should like to say that I agree with it entirely.

Appeal allowed.

Solicitors: A. J. Braga; Chung & Co.

MUTHIAH v. LEE KOR FAN

[O.C.J. (MacIntyre J.) September 1, 1965]

[Ipoh — Civil Suit No. 380 of 1964]

Land Laws — Mining — Cancellation of sublease — Onus — Discretion of court — Mining Enactment (Cap. 147), ss. 16(iii)(b) and 97(ii)(c) — Sch. X cl. 8(iii).

Estoppel — Nature of representation.